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IN THE

Supreme Court of the United States

October Term, 1972

No. ——

ROBERT E. MCDANIEL,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado entered in this case on August 8, 1972.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Colorado is *McDaniel v. People,* 499 P.2d 613 (Colo. 1972). As yet the opinion has not been printed in the official *Colorado Reports.* This opinion is printed in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Colorado was dated July 17, 1972. Rehearing was denied and judgment was entered on August 8, 1972. No order granting any extension of time within which to petition for a writ of certiorari has been entered. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1257(3).

QUESTIONS PRESENTED

(1) Whether a policeman may constitutionally arrest a citizen in the citizen's own home, without a warrant, for a misdemeanor neither committed nor attempted in the arresting officer's presence, in the absence of exigent circumstances.

(2) Whether *Colo.Rev.Stat.Anno.* (1963) §39-2-20, as interpreted and applied in this case, contravenes the Fourth and Fourteenth Amendments to the *United States Constitution*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions of the *United States Constitution* that are invoked are the Fourth Amendment and the due process clause of the Fourteenth Amendment. The relevant statutory provisions are *Colo.Rev.Stat.Anno.* (1963) §39-2-20, *Colo.Rev.Stat.Anno.* (1963) §40-7-54 [1967 Perm. Supp.], and *Colo.Rev.Stat.Anno.* (1963) §40-7-57 [1967 Perm. Supp.].

These constitutional and statutory provisions are printed in Appendix B.

STATEMENT

The petitioner is Robert E. McDaniel.

On May 25, 1969, a police officer named Donald K. Turner forced his way into McDaniel's home for the purpose of arresting McDaniel. The officer had no arrest warrant. McDaniel had neither committed or attempted any crime in the arresting officer's presence—in fact, McDaniel had not committed or attempted any crime even outside the officer's presence. No exigent circumstances existed. The ar-

resting officer had, however, received two citizens' complaints that McDaniel had committed an assault and battery, a misdemeanor.

McDaniel asked Officer Turner whether he had an arrest warrant. Officer Turner said no. McDaniel then demanded that Officer Turner forthwith leave McDaniel's home and premises. Officer Turner refused to leave and persisted in his efforts to make the arrest. McDaniel obtained a pistol to resist the arrest. McDaniel pointed his pistol at the officer; a struggle ensued; the weapon fired three times; McDaniel then ceased his resistance; and Officer Turner and the other policemen who had arrived effected the arrest.

The district attorney for the County of Adams, State of Colorado, then filed an information charging McDaniel with the felony of assault on a police officer with a deadly weapon, *Colo.Rev.Stat.Anno.* (1963) §40-5-54 [1967 Perm. Supp.]. The jury found McDaniel guilty.

At the trial, the defense tendered an instruction stating the Fourth Amendment requirements for a lawful arrest, to the effect that an officer has no authority to arrest a citizen in the citizen's own home, without a warrant, for a misdemeanor neither committed nor attempted in the officer's presence. Because the Court had not yet decided *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), the defense tendered no instruction on and the trial court gave no instruction on the exigent circumstances doctrine.

The trial court refused defense counsel's tendered instruction and instead gave the prosecution's tendered instruction, which was patterned on *Colo.Rev.Stat.Anno.* (1963) §39-2-20, as follows:

INSTRUCTION NO. 6

> You are instructed that the laws of the State of Colorado provide an arrest may be made by an officer or by a private person without warrant, for a criminal offense committed in his presence; and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

With only this meager instruction to tell them the Fourth Amendment standards for a lawful arrest, the jury naturally concluded that Officer Turner had the legal authority to arrest McDaniel in McDaniel's own home, without a warrant, in the absence of exigent circumstances, for a misdemeanor neither committed nor attempted in the officer's presence. The jury found McDaniel guilty.

The Supreme Court in *McDaniel v. People*, 499 P.2d 613 (Colo. 1972) has now approved this instruction. Therefore, law in Colorado now is that a policeman without a warrant and in the absence of exigent circumstances can break into any man's home at any time to make an arrest for a misdemeanor neither committed nor attempted in the officer's presence so long as he has some sort of probable cause. The Supreme Court of Colorado in its opinion said nothing about the exigent circumstances doctrine and nothing about the Fourth Amendment. The Supreme Court of Colorado failed to distinguish or even to cite the *Coolidge* case.

When Federal Questions Raised

The petitioner raised the Fourth Amendment questions during the trial in the District Court for the County of Adams, State of Colorado, in his motion for new trial filed

in the trial court, in his briefs filed in the Supreme Court of Colorado, and in his petition for rehearing filed in the Supreme Court of Colorado.

Reasons for Granting Writ

This petition for writ of certiorari presents a substantial question of federal constitutional law. The opinion of the Supreme Court of Colorado in *McDaniel v. People* conflicts with the opinion of the Supreme Court of the United States in *Coolidge v. New Hampshire*. The effect of the opinion of the Supreme Court of Colorado, moreover, is to nullify the Fourth Amendment right of the people in Colorado to secure in their persons and in their houses against unreasonable seizures of their persons. The arrest of a citizen in his own home, without a warrant, for a misdemeanor neither committed nor attempted in the arresting officer's presence, in the absence of exigent circumstances, is an unreasonable seizure of a person forbidden by the Fourth Amendment.

The people of this country have had the protection of law against unreasonable seizures of their persons since the *John Wilkes Cases*, 2 Wils. 150, 19 How.St.Tr. 981; 4 Burr. 2527, 19 How.St.Tr. 1076; 19 How.St.Tr. 1153; 19 How. St.Tr. 1381 (1763-1770), since *Leach v. Money*, 3 Burr. 1692, 1742, 19 How.St.Tr. 1001 (1765), and since *Entick v. Carrington*, 2 Wils. 275, 19 How.St.Tr. 1029 (1765). A similar principle was the issue in *Paxton's Case*, 1 Quincy 51 (Mass. 1761), involving the famous oration of James Otis against writs of assistance and regarded by John Adams as one of the incitements of the American Revolution.

The Supreme Court of Colorado in its opinion disregarded *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, 97 A.L.R.2d 1277 (1961):

> The Fourth Amendment, and the personal rights which it secures, has a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.

Further, the Supreme Court of Colorado in its decision ignored the words of the Supreme Court of the United States in *Jones v. United States*, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958):

> The decisions of this Court have time and time again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.

The Supreme Court of the United States should decide whether *Colo.Rev.Stat.Anno.* (1963) §39-2-20, as applied in this case, meets the standards mandated by the Fourth Amendment.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Colorado in *McDaniel v. People*, 499 P.2d 613 (Colo. 1972):

Opinion by MR. JUSTICE DAY.

McDaniel was charged with assaulting a peace officer with a deadly weapon (1967 Perm. Supp., C.R.S. 1963, 40-7-54). Upon trial, he was convicted as charged by a jury. By writ of error, McDaniel seeks reversal of the judgment.

The undisputed facts are that officer Turner of the Adams County Sheriff's Department responded to a call to investigate an alleged assault and battery. He met defendant's wife and father-in-law at the latter's residence. Both signed assault and battery complaints against McDaniel. The officer proceeded to McDaniel's house, where he contacted the defendant by the back door, which was slightly ajar. McDaniel was in the kitchen and could hear and see the uniformed officer who was standing just outside the door. There is a dispute in the testimony of the officer and McDaniel as to what was said and done, but it is clear that the officer did not proceed into the house, but returned to his patrol car to radio for more assistance (two other officers had already arrived). During this time, McDaniel went to his bedroom where he loaded and strapped to his side a .44 magnum, single-action revolver. When officer Turner returned to the back of the house, he found McDaniel just inside the fully open doorway. The officer twice asked McDaniel to remove his weapon. McDaniel refused. According to defendant's testimony, he waited until the officer's hand was away from his own weapon, in order to "get the drop on him," then drew and cocked his weapon. Being about two feet from McDaniel, the officer grabbed the re-

volver just after defendant drew it. A scuffle ensued, wherein the weapon discharged three times. The officer was slightly injured, although he was not struck by a bullet. McDaniel was subsequently subdued with the help of the two other officers.

Of the numerous alleged errors assigned herein, several involved the question of whether the jury was properly instructed. McDaniel first contends that the trial court should have instructed the jury that, as a matter of law, the arrest of McDaniel prior to the time he procured a weapon was unlawful. In this connection, the court did instruct the jury as to what constitutes a lawful arrest made without a warrant in the terms of C.R.S. 1963, 39-2-20. *See Jordan v. People*, 161 Colo. 54, 419 P.2d 656. Under the circumstances of this case, we hold that because of the dispute in the evidence as to whether there was in fact an unlawful arrest, the question was properly for the jury.

McDaniel next contends that the trial court should have clearly instructed on his theory of the case, an individual's right to resist an unlawful arrest. As noted above, the court did instruct as to what constitutes a lawful arrest made without a warrant. The trial court also instructed the jury that if they found the arrest unlawful, McDaniel had a right to resist, but only with such force as was necessary to extricate himself. McDaniel asserts that an absolute right to resist an unlawful arrest exists by virtue of 1967 Perm. Supp., C.R.S. 1963, 40-7-57, which states: "Nothing in sections 40-7-54 to 40-7-57 shall be deemed to prohibit any person from resisting an unlawful arrest." Sections 40-7-54 and 40-7-55 concern, respectively, assault against peace officer—deadly weapon, etc., and assault and battery against peace officer. Peace officer is defined in section 40-7-56.

While "resisting an unlawful arrest" is not expressly limited within the statute, we hold the statute does not broaden the long accepted rule that one may not act to protect himself or property, whether it be in self-defense or otherwise, with more force than is reasonably necessary. A peace officer cannot use excessive force in making an arrest or bringing one into submission. 5 *Am. Jur.* 2d *Arrest* § 80. Likewise, a citizen in resisting an unlawful arrest cannot act with any more force than could the officer in effecting a lawful arrest. *Wainwright v. City of New Orleans*, 392 U.S. 598, 88 S.Ct. 2245, 20 L.Ed.2d 1322 (concurring opinion of Mr. Justice Fortas). *See also State v. DeRoss*, 9 Ariz. App. 497, 454 P.2d 167; *W. R. LaFave, Arrest; The Decision to Take A Suspect into Custody* 231-43 (F. J. Remington ed. 1965). We conclude that to construe section 40-7-57 as intending to authorize the use of *excessive* force by one unlawfully arrested would, in our view, result in a palpable absurdity. *Cf. People v. Kilpatrick*, 79 Colo. 303, 245 P. 719.

Since the instruction contains a correct statement of the law and is clear and concise, we perceive no error in the trial court's declination to adopt McDaniel's proferred instructions on resisting unlawful arrest. *See LeFeve v. People*, —— Colo. ——, 492 P.2d 852 (1972).

McDaniel's other contentions have been considered and determined to be without merit.

Judgment affirmed.

MR. CHIEF JUSTICE PRINGLE, MR. JUSTICE LEE and MR. JUSTICE ERICKSON concur.

APPENDIX B

Constitutional and Statutory Provisions:

(1) *U.S. Const.* amend. 4: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2) *U.S. Const.* amend. 14: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

(3) *Colo.Rev.Stat.Anno.* (1963) §39-2-20: ". . . an arrest may be made by an officer or by a private person without warrant, for a criminal offense committed in his presence; and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

(4) *Colo.Rev.Stat.Anno.* (1963) §40-7-54 [1967 Perm. Supp.]: "Any person who commits an assault with a deadly weapon or instrument or by any means with intent to produce great bodily injury upon the person of a peace officer, where no considerable provocation appears or where the circumstances of the assault show an abandoned or malignant heart, and the person committing the crime knows or reasonably should know that the victim is a peace officer engaged in the performance of his duties, and such peace officer is en-

gaged in the performance of his duties, is guilty of a felony, punishable by imprisonment in the state penitentary not exceeding fifteen years. . . ."

(5) *Colo.Rev.Stat.Anno.* (1963) §40-7-57 [1967 Perm. Supp.]: "Nothing in [section 40-7-54] . . . shall be deemed to prohibit any person from resisting an unlawful arrest."

APPENDIX C

Portions of the Record Showing When Federal Questions Raised:

(1) Transcript of the trial in the District Court for the County of Adams, State of Colorado, folio 667:

> MR. CARROLL: . . . Instruction No. 6, which is the Colorado statute on the law of arrest is not objectionable as far as it goes; however, the instruction should go farther and state that for a misdemeanor not committed or attempted in the presence of a police officer, a police officer has no right to arrest in a private home without a warrant, and the instruction is thus defective because it does not contain that statement or words to that effect.

(2) Defendant McDaniel's motion for new trial filed November 21, 1969, folios 114-117:

> The defendant respectfully moves the court for an order granting him a new trial.
>
> AS GROUNDS FOR THIS MOTION he shows the court that the court erred in that: . . .
>
> (3) The court erroneously refused to give the jury the defendant's tendered instructions 1-28 inclusive . . .
>
> (7) The court erroneously ruled that the arrest of the defendant was not an unlawful arrest forbidden by the Fourth Amendment to the *United States Constitution* . . .

(3) Opening brief of plaintiff in error [McDaniel] filed in the Supreme Court of Colorado, page 7:

II. SUMMARY OF ARGUMENT . . .

B. The trial court erred in failing to instruct the jury that Turner's arrest of McDaniel in McDaniel's home without a warrant for a misdemeanor neither committed nor attempted in Turner's presence was an unlawful arrest . . .

E. The trial court erred in not instructing the jury on the Fourth Amendment to the *United States Constitution* . . .

(4) Opening brief of plaintiff in error [McDaniel] held in the Supreme Court of Colorado, page 30:

> Third, if the statute [*Colo. Rev. Stat. Anno.* (1963) §39-2-20] does indeed mean that a police officer can trespass into a citizen's private home and arrest him without a warrant for a misdemeanor not committed nor attempted in the officer's presence, then the statute is clearly unreasonable and is a transgression against the Fourth Amendment to the *United States Constitution* . . .

(5) Reply brief of the plaintiff in error [McDaniel] filed in the Supreme Court of Colorado, pages 23-24:

> In its Instruction No. 6, the trial court merely recited the Colorado Statute, *C.R.S.* (1963) §39-2-20:
>
> "You are instructed that the laws of the State of Colorado provide an arrest may be made by an officer or by a private person without a warrant, for a criminal offense committed in his presence; and by an officer, when a criminal offense has in fact been committed, and he has reasonable

grounds for believing that the person to be arrested has committed it."

Thus the trial court fell into . . . error . . .

In the instant case, the trial court refused McDaniel's tendered Instruction No. 13, which said:

"You are instructed that a police officer has no authority or right to enter a private home to arrest for a misdemeanor if he has no warrant and if the alleged offense was not committed or attempted in his presence."

McDaniel's tendered Instruction No. 13 is a correct statement of the law. The trial court rejected it and left the jury to its own devices and imagination, with no guidance whether a policeman may legally push his way into a citizen's home, without a warrant, and arrest the citizen for a misdemeanor neither committed nor attempted in the officer's presence. The trial court's recitation of the statute, *C.R.S.* (1963) §39-2-20, allowed the jury to assume that Turner's conduct was lawful and thus assured a conviction.

(6) Petition for rehearing filed in the Supreme Court of Colorado:

. . . there was nothing in the trial court's instructions on the law to guide the jury in its task of determining from the evidence whether the arrest was unlawful.

There was no reference in the instructions to the "exigent circumstances" criterion for a warrantless arrest laid down in *Coolidge v. New Hamp-*

shire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) . . .

Above all the instructions were silent on the authority of a policeman to arrest a citizen *in his own home* without a warrant, notwithstanding several centuries of Anglo-American history that established the right of citizens to be free from warrantless arrests in their homes for misdemeanors not committed or attempted in the presence of an arresting officer.

In Adams County, policemen frequently force their way into homes to make arrests for misdemeanors neither committed nor attempted in the presence of an arresting officer. The Supreme Court of Colorado should halt this practice . . .

In its opinion, the Supreme Court of Colorado approved an instruction that merely recited the statute, *C.R.S.* (1963) §39-2-20, verbatim and disregarded *Coolidge v. New Hampshire* . . . If this statute be construed so broadly as to sanction a warrantless arrest of a citizen in his home for a misdemeanor neither committed nor attempted in an arresting officer's presence, in the absence of exigent circumstances, then the statute contravenes the Fourth Amendment to the *United States Constitution;* and any instruction that simply reiterates the language of an invalid statute is likewise defective.